

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION (AT DAYTON)

PAYSOURCE, INC., et al.	:	CASE NO. 3:07cv0129
	:	
Plaintiffs,	:	(JUDGE WALTER HERBERT RICE)
	:	
vs.	:	
	:	
MIRABILIS VENTURES, INC., et al.	:	REPLY MEMORANDUM IN
	:	SUPPORT OF DEFENDANT
	:	MICHAEL STANLEY’S MOTION
Defendants.	:	<u>TO DISMISS</u>

Despite Plaintiffs Paysource, Inc.’s and Robert Sacco’s (collectively, “Plaintiffs”) best efforts, they cannot paper over the fatal flaw in their Complaint against Defendant Michael Stanley – their complete and utter failure to plead the content of Mr. Stanley’s alleged fraudulent statement(s) with particularity. Accordingly, pursuant to Fed. R.Civ.P. 9(b) and 12(b)(6), this Court must dismiss Plaintiffs’ Complaint.

As Mr. Stanley’s Motion¹ demonstrates, and as Plaintiffs’ Opposition concedes,² Plaintiffs have raised only three causes of action against Mr. Stanley: fraud, negligent misrepresentation and civil conspiracy. (Complaint at ¶¶67-68 and 71-78.) Fed.R.Civ.P. 9(b) requires Plaintiffs to allege facts supporting its claims of fraud, and related allegations, including the content of the allegedly fraudulent statement(s), with particularity.³

Primarily, Plaintiffs’ Complaint must fail because nowhere in the Complaint do Plaintiffs identify the content of the allegedly false or fraudulent statement. In their Opposition, Plaintiffs

¹ Defendant Michael Stanley’s Motion to Dismiss (“Mr. Stanley’s Motion”).

² Opposition to Defendant Michael Stanley’s Motion to Dismiss (“Plaintiffs’ Opposition”).

³ *In re SmarTalk Teleservs. Inc. Soc. Litig.*, 124 F.Supp.2d 505, 522 (S.D. Ohio 2000) (Sargus, J.); *Bressline v. Goldman Sachs Group, Inc.*, 477 F.3d 502, 507 (7th Cir. 2007); *In re Nat’l Century Film Enters., Inc.*, Case No. 2:03-Md-1565, 2007 WL 1362695 at *31, 38 (S.D. Ohio May 7, 2007) (attached as Exhibit A to Mr. Stanley’s Motion.)

assert for the first time, without any citation, that their Complaint includes the allegations that Mr. Stanley falsely told Plaintiffs that AEM would, at some time in the indefinite future, purchase Paysource. (Plaintiffs' Opposition at 4.) That allegation is nowhere in Plaintiffs' Complaint, which is utterly silent with regard to any statement by Mr. Stanley to Plaintiffs. However, even assuming that Plaintiffs had properly made that allegation, on its face it could not support a fraud claim; as Plaintiffs admit in their Complaint, on December 11, 2006 Paysource was purchased (Complaint ¶27a). There is nothing false about Mr. Stanley's alleged statement, and so any fraud claim based on that statement must fail.

Mr. Stanley cannot (and Rule 9(b) does not require him to) respond to the vagaries of Plaintiffs' Complaint, or Plaintiffs' current allegations, found nowhere but their Opposition. For these reasons, this Court must dismiss Plaintiffs' Complaint against Mr. Stanley.

Respectfully submitted,

/s/ Scott K. Jones

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CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2007, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the attorneys of record as follows:

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And that on August 22, 2007, I served the following defendants not represented by counsel via regular U.S. Mail, postage prepaid to the following:

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/s/ Scott K. Jones
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